FILED

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NO. 83-5995

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

WALTER KEY WILLIAMS,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THE TEXAS CAPITAL SENTENCING STATUTE ALLOWS FOR CONSIDERATION OF ALL RELEVANT EVIDENCE?

II. WHETHER THE TEXAS CAPITAL SENTENCING STATUTE ALLOWS FOR CONSIDERATION OF MITIGATING CIRCUMSTANCES?

III. WHETHER THE IMPOSITION OF THE DEATH PENALTY VIOLATES THE NINTH AMENDMENT?

IV. WHETHER EVIDENCE WAS SEIZED IN VIOLATION OF THE FOURTH AMENDMENT?

V. WHETHER PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, which is unpublished, is reproduced in Appendix A to the Petition for Writ of Certiorari. The Texas Court of Criminal Appeals denied the Motion for Leave to File Petitioner's Motion for Rehearing without written order on September 14, 1983.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner bases his claims upon the Fourth, Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

The record reflects that Petitioner was indicted on April 29, 1981, in Bexar County, Texas, for the murder of Daniel A. Liepold while in the course of committing and attempting to commit the offense of robbery. Trial began on January 20, 1982 and on January 21, 1982, the jury found Petitioner guilty of the capital offense. On January 22, 1982, after a punishment hearing, the jury answered affirmatively the special issues submitted pursuant to Article 37.071, Tex. Code Crim. Proc. Ann. (Vernon). Accordingly, punishment was assessed at death. Petitioner appealed his conviction and sentence to the Texas Court of Criminal Appeals, which on June 22, 1983 affirmed the conviction and sentence. Rehearing was denied on September 14, 1983.

STATEMENT OF FACTS

The pertinent facts are set out in the opinion of the court below. Williams v. State, No. 68,971 (Tex.Crim.App. -- June 22, 1983). (See Appendix A to the Petition for Writ of Certiorari).

SUMMARY OF ARGUMENT

There are no special or important reasons to review this case. The issues presented involve only the application of well-settled constitutional principles to the facts involved herein. This Court is without jurisdiction to consider Petitioner's Ninth amendment and Sixth Amendment ineffective assistance of counsel claim because Petitioner has not presented the precise issues raised herein to the Texas Court of Criminal

Appeals. Further, Petitioner's Fourth Amendment claim involves nothing more than evidentiary questions and factual determinations made by the state courts below.

The issue of whether the Texas capital sentencing statute allows for the introduction of all relevant evidence and for consideration of mitigating circumstances was previously decided by this Court in Jurek v. Texas, 428 U.S. 262 (1976). Further, this Court has expressly recognized that specific standards for balancing aggravating factors are not constitutionally mandated.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefore. Petitioner has advanced no special or important reason in this case and none exists. Further, this case presents only the question of whether well-settled constitutional principles were correctly applied to the facts of this case. Thus, no important question of law is presented here.

II.

THIS COURT IS WITHOUT JURISDICTION TO CONSIDER PETITIONER'S CLAIMS OF VIOLATION OF THE NINTH AMENDMENT AND INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THEY WERE NOT PRESENTED TO THE TEXAS COURT OF CRIMINAL APPEALS.

The cases are legion that this Court will not decide issues raised for the first time on petition for writ of certiorari or on appeal, and that the Court will not decide federal questions not raised and decided in the court below. E.g., Illinois v. Gates, 103 S.Ct. 2317, 2321-23 (1983); Tacon v. Arizona, 410 U.S.

351, 352 (1973); Hill v. California, 401 U.S. 797, 805-06 (1971); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). In articulating this requirement, the Court has stressed the long-standing nature of the rule: "[I]n Crowell v. Randell, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, 20, Section 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appeal on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391." Cardinale v. Louisiana, 394 U.S. at 439. To properly invoke the jurisdiction of the Court, it is crucial that the federal question not only be raised in the state proceedings, but that it be raised at the proper point. Beck v. Washington, 369 U.S. 541, 550 (1962); Godchaux Co., Inc. v. Estopinal, 251 U.S. 179, 181 (1919).

Petitioner's contentions that the death penalty violates the Ninth Amendment in that it deprives Petitioner of his right to life and that he was denied effective assistance of counsel have never been presented to the Texas Court of Criminal Appeals. Respondent submits that in view of Petitioner's failure to sufficiently and properly raise the issues presented here below, the failure of the state court to pass on these issues, and the desirability of giving the state the first opportunity to address the issues, the application for certiorari should be denied for want of jurisdiction. Cardinale v. Louisiana, 394 U.S. at 439.

III.

REVIEW OF PETITIONER'S FOURTH AMENDMENT CLAIM SHOULD BE DENIED AS ONLY QUESTIONS OF EVIDENCE AND FACTUAL FINDINGS ARE INVOLVED.

The petition for writ of certiorari does not raise unsettled questions of law. The Fourth Amendment issues addressed involve nothing more than evidentiary questions and factual determinations made by the state trial and state appellate courts. As Petitioner recognizes in his petition, the standard by which "consent" is to be determined is well-established. Texas v. Brown, 103 S.Ct. 1535 (1983); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Coolidge v. New Hampshire, 403 U.S. 443 (1971). The courts below carefully considered Petitioner's questions of whether the entry onto the premises was with consent and whether the weapon was within plain view in light of these decisions before rejecting them. Williams v. State, Slip opinion at 8-14.

IV.

THE TEXAS CAPITAL-SENTENCING STATUTE PROVIDING FOR THE ADMISSION OF "ALL RELEVANT EVIDENCE" AT THE PUNISHMENT PHASE OF TRIAL HAS PREVIOUSLY BEEN UPHELD BY THIS COURT IN JUREK V. TEXAS, 428 U.S. 262 (1976).

In Jurek v. Texas, 428 U.S. 262 (1976), this Court upheld the Texas capital-sentencing statute against constitutional attacks under the Eighth and Fourteenth Amendments. The Court held that because Texas has severely limited the statutory offenses for which capital punishment might be imposed to offenses involving at least one aggravating circumstance, has allowed for mitigating circumstances relating to the individual defendant at the punishment stage, and has provided for prompt judicial review, "Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death

sentences under the law" and the "system serves a to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed." Id. at 276.

This Court upheld the constitutionality of the Texas statute precisely because it provided for the admission of "all relevant evidence". The Court noted:

> Texas law requires that if a defendant has been convicted of a capital offense, the trial court must conduct a separate sentencing proceeding before the same jury that tried the issue of guilt. Any relevant evidence may be introduced at this proceeding and both the prosecution and defense may present argument for or against the sentence of death . . . The Texas capital sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstance of the individual offense and the individual offender before it can impose a sentence of death . . . What is essential is that the jury have before it all the possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced. (Emphasis added).

Jurek v. Texas, 428 U.S. at 267, 273-74, 276. There is nothing in the record to indicate that the evidence of the extraneous offense (via Petitioner's confession) was inherently unreliable or that its use subjected Petitioner to "arbitrary," "capricious" and "wanton" imposition of the death penalty. Further, contrary to Petitioner's assertion that "the sole evidence relied upon by the state to demonstrate Petitioner's likelihood to commit future acts of violence was the unadjudicated offense" (Petition for Writ of Certiorari at 11), the record reflects that at the time the jury deliberated on punishment, it had before it all the evidence presented at the guilt stage of trial. See O'Bryan v. Estelle, 714 F.2d 365, 386 (5th Cir. 1983), cert. denied sub nom. O'Bryan v. McKaskle, 103 S.Ct. 1015 (1984). The admission of the

extraneous offense in no way undermines the constitutionally mandated procedures for imposition of the death penalty set forth in Jurek.

V.

THE ISSUE OF WHETHER THE TEXAS CAPITAL SENTENCING STATUTE ADEQUATELY ALLOWS FOR CONSIDERATION OF MITIGATING CIRCUMSTANCES WAS SETTLED BY THIS COURT IN JUREK V. TEXAS, 428 U.S. 262 (1976).

Petitioner's contention that the statute precludes the sentencing body from considering Petitioner's age because it limits their consideration to Special Issue No. 2 is without merit. In upholding the Texas capital sentencing statute, this Court expressly noted that Texas law allows the jury to consider whatever evidence of mitigating circumstances the defense can bring before it. Jurek v. Texas, 428 U.S. at 272-73.

Further, Petitioner's contention that the jury was precluded from considering his age is refuted by the record. The record clearly reflects that the defense continuously argued in closing at the punishment trial that the jury consider Petitioner's young age and the lack of any pattern in his criminal behavior in assessing whether Petitioner would be a continuing threat to society (Statement of Facts, Vol. XVII, 44-45, 49-51).

Petitioner completely fails to allege or demonstrate any mitigating evidence which the trial court precluded the defense from presenting to the jury or any evidence that the trial court refused to consider. His reliance on Eddings v. Oklahoma, 455 U.S. 104 (1982) is misplaced.

CONCLUSION

For these reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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